



Comptroller General
of the United States

Washington, D.C. 20548

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Decision

Matter of: Ace-Federal Reporters, Inc.; Federal Energy
Regulatory Commission--Reconsideration

File: B-245149.2; B-245149.3

Date: April 6, 1992

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Denise M. O'Brien, Esq., Federal Energy Regulatory Commission, for the agency.
Joseph Gallo, Esq., for Ann Riley & Associates, Ltd.
Daniel I. Gordon, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Requests for reconsideration of decision sustaining protest that solicitation should be issued as a small business set-aside are denied where agency and interested party do not show that the decision improperly concluded that the agency lacked a reasonable basis to issue the solicitation as unrestricted rather than as a set-aside.

DECISION

The Federal Energy Regulatory Commission (FERC) and Ace-Federal Reporters Inc. request reconsideration of our decision, Ann Riley & Assocs., Ltd., B-245149, Dec. 16, 1991, 71 Comp. Gen. _____, 91-2 CPD ¶ 544, in which we sustained the protest filed by Ann Riley against the determination by FERC to issue invitation for bids (IFB) No. DE-FB39-91-RC0002 for stenographic reporting services on an unrestricted basis, rather than as a small business set-aside. Both requests for reconsideration focus primarily on the factual question of whether the agency could have a reasonable expectation that any award to a small business would be at a fair market price. Both FERC and Ace contend that the agency could have no such expectation and therefore our decision improperly concluded that the agency was required to set aside the procurement for exclusive small business participation. See Federal Acquisition Regulation (FAR) 19.502-2(a). Based on the same alleged inability of small businesses to offer a fair market price, the reconsideration requests also assert that restricting the

procurement to small businesses would violate Pub. L. 101-514, 104 Stat. 2093, which mandates that FERC shall accept "the bid of a qualified contractor that is financially most advantageous to the Government." FERC and Ace also reassert the contention that the agency's authority to restrict the procurement to small businesses was eliminated by a September 11, 1990, letter written by FERC's chairman to Senator Metzenbaum.

We deny the reconsideration requests.

As the requests for reconsideration correctly note, our Office generally views as a business judgment within the discretion of the contracting officer the determination that there is, or is not, a reasonable expectation that offers will be obtained from at least two responsible small business concerns and that award will be made at a fair market price. See EKW Inc. Sys., 68 Comp. Gen. 541 (1989), 89-2 CPD ¶ 32. However, we will review the record to determine whether the agency undertook reasonable efforts to ascertain whether it is likely that the agency will receive offers from at least two small businesses with the required capabilities. Neal R. Gross & Co., Inc., B-240924.2, Jan. 17, 1991, 91-1 CPD ¶ 53. In our initial decision, we concluded that FERC failed to undertake the requisite efforts and that the record before the agency provided no basis for FERC's decision not to set aside this procurement for small businesses.

The assertion that the contracting officer could not have determined that award under a set-aside could be made at a fair market price for the services at issue is the gravamen of the requests for reconsideration. As explained in our initial decision, FERC historically has received stenographic services at no cost to the agency, the contractor instead receiving compensation through charges to the public for copies of transcripts. Because of the contractor's ability to profit through these sales to the public, firms have on occasion offered to pay FERC a "bonus" bid of a set amount per page. Although FERC for a time treated bonus bids as improper, the record contains three instances in which bonus bids have been offered, as follows:

Five cents per page: In 1989, Ace offered a bonus bid of \$0.05 per page. That bid was accepted and, having received a contract with that rate 2 years ago, Ace has been paying FERC \$0.05 per page since that time.

Fifty cents per page: In 1990, Executive Court Reporters, Inc., a small business, offered a bonus bid of \$0.50 per page. As a result of the ensuing litigation, performance of the contract awarded to Executive was suspended.

One dollar fifty-five cents per page: In 1990, Ace offered a bonus bid of \$1.55 per page. That bid was submitted in the midst of litigation, and the agency report in an earlier protest, Ace-Federal Reporters, Inc., B-241309, Dec. 14, 1990, 91-2 CPD ¶ 438, informed our Office that Ace had conceded that the \$1.55 bid was made "for dramatic effect only" and was "never on the table." Accordingly, FERC concluded that the \$1.55 bid could not have been given "any credibility" by the agency.

Thus, the record indicates that the highest bonus bid that FERC considers had any credibility was \$0.50. FERC does not claim that it conducted a market survey or made any other effort to ascertain which offerors, if any, would be willing to bid more than the \$0.50 bonus bid offered by the small business (Executive). Thus, there is nothing in the record to support a determination that the fair market price exceeds a \$0.50 bonus bid, and the agency has never actually been paid at that rate; rather, Ace continues to pay only \$0.05 per page.

Nevertheless, both requests for reconsideration presume that only large businesses can reasonably be expected to offer bonus bids and that, even if small businesses might submit bonus bids, large businesses can be expected to bid higher bonus bids. The record provides no basis for either presumption. The highest bonus bid for the services in question that FERC has found credible was submitted by a small business. Another small business, Ann Riley, has indicated an intent to submit a bonus bid.¹ No economy of scale has been asserted, nor is any apparent, in the stenographic transcription business. The only credible bonus bid submitted by Ace, which is a large business, was

¹Ace contends that Ann Riley's declared willingness to submit a bonus bid should be disregarded because that company is nonresponsible. However, this contention is specious both because it is based on the premise that the contracting agency should be allowed to make an impermissible, premature nonresponsibility determination, see PRB Uniforms, Inc., 56 Comp. Gen. 976 ((1977)), 77-2 CPD ¶ 213, and because the Small Business Administration has conclusive statutory authority to determine the responsibility of a small business. Pittman Mechanical Contractors, Inc., B-242499, May 6, 1991, 91-1 CPD ¶ 439.

\$0.05, one-tenth the amount offered by the small business. Finally, nothing in the record submitted by FERC, either during the course of the protest or in its request for reconsideration, indicates that the agency has ever undertaken an effort to ascertain the bonus bid rate that small businesses with the capabilities to perform the work would be willing to bid.

In sum, the highest bonus bid that FERC found credible was \$0.50, which was offered by a small business. FERC has no rational basis for determining that the fair market price for the services at issue is higher than \$0.50 per page. Further, even if it is assumed that something higher than \$0.50 per page is the fair market price, FERC has no basis for a determination that fewer than two small responsible businesses can be expected to offer a fair market price or that a large business will outbid the small businesses.

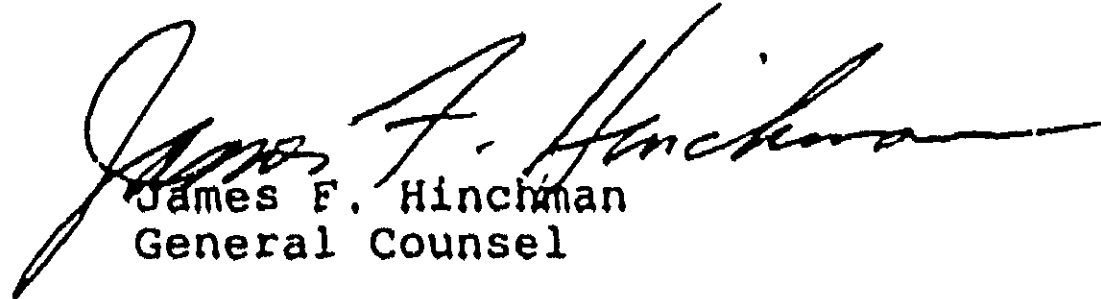
Both Ace and the agency also contend that FERC had no choice but to issue the IFB on an unrestricted basis. Ace in particular insists that the statutory directive of Pub. L. 101-514, 104 Stat. 2093, that FERC accept "the bid of a qualified contractor that is financially most advantageous to the Government" means that no small business set-aside is permitted. This argument essentially reflects a mere disagreement with the interpretation set forth in our original decision, and nothing raised in the requests for reconsideration points to any error of fact or law in our decision in this respect.

The statutory language does not authorize FERC to deviate from any provision of the FAR. On the contrary, the statute explicitly directs the agency to act "in accordance with Federal Acquisition laws and regulations," which include the small business set-aside provisions of the FAR. It does no more than direct the agency to cease its earlier practice of rejecting bonus bids and requires FERC to consider such bids. In this regard, we note that FERC states in its request for reconsideration that "Congress clearly intended that the 'financially most advantageous [(bid)] to the Government' should be a bonus bid." We agree, and our decision does not preclude FERC from accepting bonus bids.

Similarly, no basis to deviate from the FAR's small business set-aside requirements arises from the exchanges between Senator Metzenbaum and FERC's chairman. Senator Metzenbaum's July 17, 1990, letter challenged the agency's prior approach of rejecting bonus bids as nonresponsive; FERC's chairman replied by indicating that bonus bids would no longer be rejected. Although that reply was couched in terms of the award being made on the basis of "full and open competition," we understand that phrase to refer in this context to allowing bonus bids. As we pointed out in our

initial decision, small business set-asides are competitive procedures under the Competition in Contracting Act of 1984, as amended. See 41 U.S.C. §§ 253(b)(2) and 259(b)(4) (1988). Moreover, if the agency had intended to deviate from the FAR's small business set-aside procedures, it would, as noted in our original decision, have been required to follow appropriate procedures to authorize such a deviation.²

The requests for reconsideration are denied.


James F. Hinchman
General Counsel

²Both FERC and Ace also suggest that the agency is not free to issue the solicitation as a small business set-aside due to a preliminary injunction issued by the U.S. District Court for the District of Columbia. We understand that preliminary injunction to have been issued in the context of the predecessor interim solicitation, not the one at issue in this protest. Since issuance of the injunction in October 1990, the District Court has apparently not considered the merits of the dispute. Both FERC and Ace indicate that at this point the injunction remains in place solely to allow our Office to resolve this protest. Accordingly, existence of the injunction does not constrain our evaluation of the merits of the protest. Whether the court will lift the injunction once this decision is issued is a matter between the parties and the court.